Beverly Enterprises-Massachusetts, Inc., d/b/a Beverly Manor Nursing Home *and* Hospital Workers Union Local 767, Service Employees International Union, AFL–CIO. Cases 1–CA–35006 and 1–CA–35390

June 16, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Pursuant to charges filed by the Union on March 3, 1997[1] and amended May 7 in Case 1–CA–35006, the General Counsel of the National Labor Relations Board issued a complaint on May 27. Thereafter, on July 8, the Union filed a charge in Case 1–CA–35390 and an amendment on September 8, and a second amended charge was filed on October 16. On October 28, the General Counsel issued complaint in Case 1–CA–35390 and an Order Consolidating Cases and Rescheduling Hearing for both cases.

The complaints allege that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by unilaterally changing (decreasing) the maximum rate of the 1997 anniversary date wage increases paid to its unit employees, and by refusing since July 15 to furnish information requested by the Union, all at a time when it had a duty to bargain with the Union about these matters.[2] The Respondent filed answers admitting and denying in part the allegations in the complaints.

On June 18, 1998, the General Counsel filed a Motion for Summary Judgment. On June 25, 1998, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent, in both its answer and its response to the Notice to Show Cause, denies that it refused to bargain, that it made unilateral changes to the unit employees' 1997 maximum rate of anniversary wage increase, and that it refused to furnish the Union with requested information regarding the bargaining unit employees. In its response to the Notice to Show Cause, the Respondent asserts as its affirmative defenses that its previous withdrawal of recognition from the Union was lawful, that the Union is defunct, and that the Union placed unlawful conditions on bargaining.

1. The change in the maximum rate for anniversary wage increases

The Respondent contends that it did not implement any unilateral changes in the maximum rate for the anniversary wage increase, but that the amount that was awarded merely followed its past practices and formula.

In response, the General Counsel relies on the Board's April 9,1998, Decision and Order, 325 NLRB 598,[3] in which the Board addressed similar Section 8(a)(5) and (1) allegations against the Respondent regarding the reduction of the maximum 1996 anniversary wage increase from 4 percent to 3 percent. The General Counsel contends that the Board's conclusions in that case control the instant proceeding.

In agreement with the General Counsel, we reject the Respondent's affirmative defenses raised by its response to the Notice to Show Cause in this proceeding, which are the same as those considered and rejected in the prior decision. In that decision,[4] the Board specifically found that "the Respondent's established merit increase program consisted mainly of fixed features, i.e., awarding standard 4-percent maximum increases to most (90 percent) of its employees following their annual appraisals."[5] The Board ordered the Respondent, among other things, to continue paying the 4-percent maximum anniversary increases to unit employees until any changes in the program were agreed to as a result of bargaining in good faith with the Union or were lawfully implemented pursuant to a valid bargaining impasse. The Board also affirmed the judge's finding that the Respondent's withdrawal of recognition from the Union was unlawful and, therefore, that the Union was still the lawful exclusive collective-bargaining representative of the unit employees.

Because the Respondent has not complied with the prior Order of the Board and court regarding these same issues nor argued here that it possesses any newly discovered evidence, special circumstances, or other affirmative defense not already considered and rejected by the Board and the court, we find no factual or legal issues presented which would warrant a hearing to reexamine our decision in the prior proceeding. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment of its unit employees by reducing

[1] All dates are 1997 unless otherwise noted.

[2] The bargaining unit is described as:

> All full time and regular part-time service and maintenance employees, including nursing assistants, dietary aides, cooks, rehabilitation aides, and activity assistants employed by the Employer at its Plymouth, Massachusetts nursing home, but excluding all managers, supervisors, RNs and LPNs, business office clericals, per diem casuals, Administrator, Director of Nursing, Director of Staff Development, Social Services Director, Activities Director/Coordinator, Dietary Manager, Medical Records Professional, maintenance supervisor, and guards within the meaning of the Act.

[3] Enfd. 174 F.3d 13 (1st Cir. 1999).

[4] The Respondent's answers to both complaints also assert as affirmative defenses that the Union has taken an intractable position and/or has waived its right to bargain. However, in its response to the notice to show cause, the Respondent has not raised any material issue of fact regarding these defenses, other than matters that were already litigated and decided in the prior proceeding.

[5] Id.

the 1997 anniversary wage increases maximum from 4 percent.

2. The refusal to furnish information to the Union

By letter dated July 7, the Union made an information request seeking "full information on the bargaining unit," itemizing the specific information sought. By letter dated July 15, the Respondent refused to furnish the Union with the requested information. The Respondent raises the same affirmative defenses as discussed above.

It is well established that the Union, as the certified collective-bargaining representative of the unit employees, has a right to obtain information, which relates to the "core" terms and conditions of employment. *Venture Packaging*, 294 NLRB 544, 561 (1989). Here, the Union requested "full information" about the bargaining unit including names, addresses, hours scheduled, hours worked per week for the last six months, job categories, and other terms and conditions of employment which are mandatory subjects of collective bargaining. *Indiana Hospital*, 315 NLRB 647, 663 (1994). We find that this information is presumptively relevant and reasonably necessary to the Union's performance of its duties as the certified representative of the bargaining unit employees and that the Respondent has an obligation to furnish the Union with the requested information. *Top Job Building Maintenance Co*., 304 NLRB 902, 909 (1991). Moreover, as noted above, the Respondent's affirmative defense that the Union is not the lawful bargaining representative of its employees has been considered and rejected by the Board and court. Likewise, the Respondent has not raised any material issue of fact regarding its other affirmative defenses aside from what has already been litigated and decided in the prior proceeding. Therefore, contrary to the Respondent's contention, we find that there are no factual or legal issues warranting a hearing. Accordingly, we conclude that the Respondent has violated its collective-bargaining obligations under the Act, when it admittedly refused to furnish the requested information and by that refusal, the Respondent violated Section 8(a)(5) and (1) of the Act.

Accordingly, we grant the Motion for Summary Judgment.[6]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with a place of business in Plymouth, Massachusetts, has been engaged in the operation of a nursing home. During the calendar year 1996, the Respondent derived gross revenues in excess of $100,000 and purchased and received at its Plymouth facility goods valued in excess of $5,000 from locations directly outside the Commonwealth of Massachusetts. We find that the employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a health care institution within the meaning of Section 2(14) of the Act. We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On or about January 1, 1997, the Respondent decreased the 4 percent maximum rate of the anniversary date wage increases paid to its unit employees without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent.

On or about July 15, 1997, the Respondent, by its human resources manager, J. F. Begley, refused to provide to the Union certain collective-bargaining information regarding the bargaining unit employees requested in the Union's July 7, 1997 letter.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has unilaterally reduced the 4 percent maximum anniversary wage increase for its unit employees in 1997, without first bargaining with the Union in good faith to impasse, we shall order the Respondent to restore this maximum anniversary wage increase and make whole the unit employees for any loss of pay they may have suffered due to the Respondent's unilateral change, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that on and since July 15, 1997, the Respondent has unlawfully refused to furnish to the Beverly Manor Nursing Home and Hospital Workers Union, Local 767, Service Employees International Union, AFL–CIO, certain information regarding the unit employees that is necessary and relevant to the Union's collective-bargaining responsibilities, we shall order the Respondent to furnish the information as detailed in its July 7, 1997 letter.

ORDER

The Respondent, Beverly Enterprises-Massachusetts, Inc., d/b/a Beverly Manor Nursing Home, Plymouth,

[6] The Respondent also contends that summary judgment in these cases is not appropriate because the judge in the prior proceeding issued a bench decision, which the Respondent characterizes as an "unlawful and hasty process." We note that the court in enforcing the prior Board decision rejected the Respondent's challenge to the Board's bench decision process. 174 F.3d 13 (1st Cir. 199).

Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the Hospital Workers Union, Local 767, Service Employees International Union, AFL–CIO as the exclusive representative of its employees with respect to rates of pay, wages, hours of employment and other terms and conditions of employment, in an appropriate unit consisting of:

> All full time and regular part-time service and maintenance employees, including nursing assistants, dietary aides, cooks, rehabilitation aides, and activity assistants employed by the Employer at its Plymouth, Massachusetts nursing home, but excluding all managers, supervisors, RNs and LPNs, business office clericals, per diem casuals, Administrator, Director of Nursing, Director of Staff Development, Social Services Director, Activities Director/Coordinator, Dietary Manager, Medical Records Professional, maintenance supervisor, and guards within the meaning of the National Labor Relations Act.

(b) Making unilateral changes in the 4-percent maximum anniversary wage increases without prior notice to, or bargaining with, the Union, as the exclusive representative of the bargaining unit described above.

(c) Refusing to furnish to the Union information which it requested in it letter of July 7, 1997, which is necessary and relevant to the Union's performance of its function as the exclusive bargaining representative of the bargaining unit as described above.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore and immediately put into effect the annual 4 percent maximum anniversary wage increases for all unit employees for 1997 and continue such increases until any changes have been bargained with the Union in good faith and embodied in a collective-bargaining agreement or a valid impasse has been reached.

(b) Furnish to the Union in a timely manner the information requested by the Union on July 7, 1997.

(c) On request, bargain in good faith with the Union as the exclusive representative of the employees in the unit described above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(d) Within 14 days of the date of this Order, make the unit employees whole for any loss of earnings and other benefits they may have suffered by the Respondent's unlawful unilateral changes in the anniversary wage increase maximum in the manner set forth in the remedy section of the decision.

(e) Within 14 days after service by the Region, post at its facility Plymouth, Massachusetts copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1997.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally change the terms and conditions of employment of our employees without having first bargained with the Hospital Workers Union, Local 767, Service Employees International Union,

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

AFL–CIO in good faith to impasse regarding the payment of the annual 4-percent maximum anniversary wage increases.

WE WILL NOT refuse to bargain with the Union by refusing to supply requested relevant information regarding the unit employees necessary for the Union to perform its exclusive representative responsibilities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning the annual maximum anniversary wage increase and put into writing and sign any agreement reached.

WE WILL furnish to the Union in a timely fashion the information requested by the Union in its letter dated July 7, 1997.

WE WILL make the unit employees whole for any losses incurred as a result of our unlawful unilateral change, with interest.

BEVERLY ENTERPRISES-MASSACHUSETTS, INC., D/B/A BEVERLY MANOR NURSING HOME